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SUPREME COURT, U.S.

No. 06-36

IN THE

Supreme Court of the United States

PUBLIC AGENCY COMPENSATION TRUST (PACT),

Petitioner,

v.

COLIN PERRY ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Nevada

BRIEF IN OPPOSITION

BARBARA GRUENEWALD
ANDERSON & GRUENEWALD
439 MARSH AVENUE
Reno, NV 89509
(775) 322-3366

ROBERT S. PECK*
CENTER FOR CONSTITUTIONAL
LITIGATION, P.C.
1050 31st Street, N.W.
Washington, DC 20007
(202) 944-2874

*Counsel of Record

QUESTION PRESENTED

Whether the conclusive presumption in NRS 617.457, applicable only to state agencies and political subdivisions employing police or firefighters, violates the Due Process Clause of the Fourteenth Amendment.

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondent Colin Perry respectfully requests that this Court deny the petition for writ of certiorari that seeks review of the Nevada Supreme Court's decision in this case.

STATEMENT OF THE CASE

Petitioner Public Agency Compensation Trust (PACT) has provided workers compensation insurance to the Elko County Sheriff's Department since the mid-1990s. Respondent Perry served as a Deputy Sheriff for Elko County from 1986 to 2000. In 1992, he suffered an injury to his heart and the workers compensation insurer for the Elko County Sheriff's Department at that time accepted his claim. In 1998, as a result of a new heart injury, Perry unsuccessfully attempted to reopen his prior claim. He then made a new claim with the department's new insurer, PACT, which PACT rejected.

Under the pertinent Nevada statute, NRS 617.457, on the books since 1989, Perry's coronary artery disease is conclusively deemed to be occupationally related as a result of his continuous service as a police officer over a period of more than five years. Even so, Nevada law permits an employer to challenge eligibility by showing that the employee failed "to correct predisposing conditions which lead to heart disease when so ordered in writing by the examining physician subsequent to the annual examination." NRS 617.457(6). Such predisposing conditions can include diabetes, overweight, smoking, high blood pressure, and high cholesterol.

After receiving extensive evidence on the medical issues from both parties, *see* Pet. at 5a-7a, a hearing officer of the Nevada Department of Administration found that PACT's denial of Perry's claim to be erroneous

and held that Perry's claim was valid. PACT unsuccessfully appealed that decision administratively and then to a state district court, challenging the conclusive presumption's constitutionality at the same time. The district court's decision was affirmed by the Nevada Supreme Court.

In its Petition for Certiorari, PACT provides no basis for further review by this Court. It asserts a single conflict between the Nevada decision this year and a 1971 Connecticut Supreme Court decision that has been superceded by statute, while failing to disclose a California Supreme Court decision that reached the same conclusion as the court below. Respondent respectfully submits that the Connecticut court's decision is doubly flawed in a manner that cancels out any conflict. First, the decision erred in predicting that this Court would liberalize its standing jurisprudence and allow a political subdivision to make a due-process claim against the State that created it, thereby reaching a question no other court has entertained. In fact, in the 35 years since the Connecticut court's prediction, this Court has neither relaxed its standing requirements nor accorded political subdivisions due-process rights against its sovereign. Second, the Connecticut court permitted the legislature to create special compensation requirements as a substitute for the conclusive presumption it found unconstitutional, creating a distinction without a difference. If the decisions in Nevada and Connecticut, 35 years apart, are in actual conflict, a dubious claim at best, it hardly cries out for this Court's attention.

Alternatively, PACT erroneously asserts that the Nevada Supreme Court has failed to apply the correct applicable law of this Court. Even if correct, which Respondent disputes, Rule 10 of this Court's rules makes plain that petitions based on claims of misapplication of the law are "rarely granted." Sup. Ct. R. 10. This petition should be denied.

PACT further asserts that the question presented will have considerable public policy impact *in Nevada,* Pet. at 13-14, but such an assertion provides no basis upon which to invoke this Court's jurisdiction. Its public policy claim is entirely premised on a newspaper article and actuarial studies making representations about expenses associated with this statute that were not part of the record at the factfinding stage of this case and only submitted, improperly, to the Nevada Supreme Court with Petitioner's unsuccessful motion for reconsideration en banc. It was not considered by the court below. It should not be first reviewed by this Court – or by any court, for that matter, because whatever expense this program entails is a matter of Nevada legislative cognizance and not Federal constitutional dispute.

Finally, it should be noted that PACT asserts a due-process right that cannot be accorded to its insured. As a political subdivision of the State, neither Elko County nor its Sheriff's Office may assert a due-process claim against the sovereign that created it. Moreover, PACT was fully aware of the challenged statute when it wrote its insured's policy and cannot claim a lack of notice for the liabilities it was insuring against.

REASONS FOR DENYING THE PETITION

I. PETITIONER HAS NOT ASSERTED A CONFLICT THAT REQUIRES THIS COURT'S ATTENTION

PACT focuses its Petition primarily on an assertion that the Nevada Supreme Court's decision conflicts with this Court's precedents that have invalidated other conclusive presumptions on due-process grounds. Pet. at 6-9. The cases cited, however, are inapplicable to this matter and provide no basis for this Court's review.

At bottom, the Nevada Supreme Court's constitutional analysis was appropriate. The Court found that Petitioner did not carry its burden to demonstrate that this 37-year-old law denies due-process. Pet. at 3c-4c.

Unlike the successful individual plaintiffs in the cases cited by Petitioner,[1] all of which were reviewed in a similar challenge by the California Supreme Court in 1978 and held to be inapplicable to this issue,[2] the Nevada law only adversely affects cities and counties,

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[1] Petitioner relies on *Vlandis v. Kline*, 412 U.S. 441 (1973)(individual plaintiff instituted due process challenge to conclusive presumption about nonresidency for purposes of becoming eligible for in-state tuition); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1973)(individual plaintiffs mounted due process challenge to conclusive presumption that female teachers who were five months pregnant could not continue in job and must terminate employment); *Stanley v. Illinois*, 405 U.S. 645 (1972)(individual plaintiff challenged conclusive presumption that unmarried fathers are not suitable parents); *U.S. Dep't of Agric. v. Murry*, 413 U.S. 508 (1973)(class of individuals raised due process challenge to conclusive presumption about relationship of tax dependency and eligibility for food stamps); *Turner v. Dep't of Employment Sec.*, 423 U.S. 44 (1975) (individual plaintiff instituted due process challenge to statute making pregnant woman ineligible for unemployment benefits for period extending from 12 weeks before expected date of childbirth and until a date six weeks after childbirth).

[2] Precisely the same U.S. Supreme Court caselaw was cited to the California Supreme Court in support of an identical argument against a similar workers compensation law containing a conclusive presumption for the benefit of police officers. The California Court found the cases easily distinguishable. *City and County of San Francisco v. Workers' Compensation Appeals Bd.*, 583 P.2d 151, 160 (Cal. 1978).

rather than individuals. It imposes upon them the burden of providing workers compensation benefits to eligible firefighters and police officers who contract heart disease. This Court has found no constitutional flaw in similar legislation, finding only a rational connection is necessary. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) (legislation may "readjust rights and burdens" and "impose a new duty or liability based on past acts" consistent with the Constitution). It is well established that counties and their departments, such as Respondent Perry's former employer, the Elko County Sheriff's Department, as political subdivisions of the State, do not have due-process rights under the Fourteenth Amendment that may be asserted against the state that created them. *Williams v. Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933)("A municipal corporation, created by the state for the better ordering of government, has no privileges or immunities under the Federal Constitution which it may invoke in opposition to the will of its creator."). *See also Joslin Mfg. Co. v. City of Providence*, 262 U.S. 668, 674 (1923)(citations omitted) ("political subdivisions of the state . . . are subject to the will of the [State] Legislature and may be compelled not only to recognize their legal obligations but to discharge obligations of an equitable and moral nature as well.").

For purposes of constitutional analysis, it does not matter that the due-process claim is being made by PACT, rather than the Elko County Sheriff's Department. PACT, as the department's insurer on this claim, stands in the department's shoes and cannot assert rights that its insured does not possess. *Great American Ins. Co. v. United States*, 575 F.2d 1031, 1033 (2d Cir. 1978). It is significant that PACT is not asserting a lack of notice to its potential responsibility for paying the sheriff's department's liability. The conclusive

presumption was added to NRS 617.457 in 1989. *Gallagher v. City of Las Vegas*, 959 P.2d 519, 522 n.2 (Nev. 1998).[3] PACT was not the department's workers compensation carrier in 1992, when Perry made his first claim but undertook that role prior to the present claim, made in 1998. Because PACT is in the business of providing workers compensation coverage to public agencies and political subdivisions, *see* Pet. at 2 n.2, the conclusive presumption was no surprise and must have been within its calculus in setting its premiums. Simply put, neither PACT nor its insured can mount any due-process claim.

PACT also claims the Nevada decision conflicts with a 35-year-old Connecticut Supreme Court decision, *Ducharme v. City of Putnam*, 285 A.2d 318 (Conn. 1971)), *superceded by statute*, where the Connecticut court struck down a similar statute after erroneously predicting that this Court was on the verge of liberalizing its standing doctrine to allow a political subdivision to assert a due-

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[3] While PACT asserts that the presumption is irrational because there is no consensus in the medical/scientific community that the stress entailed in service as a police officer or firefighter causes heart disease, Pet. at 5 n.3, the legislature is entitled to adopt one side of a debatable proposition as the State's public policy. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 33-34 (1976). Siding with one set of experts over another is not arbitrary and capricious. *Id.* at 34. The California Supreme Court recognized that the division of medical opinion was "probably the most prolific and troublesome problem in workmen's compensation law' (Larson, *The "Heart Cases" in Workmen's Compensation: An Analysis and Suggested Solution* (1967) 65 Mich. L. Rev. 441, 441), [and] arises from 'the persisting cleavage in medical theory itself' (id., at p. 475) as to the relationship between stress, physical exertion and progressive heart disease." *City and County of San Francisco*, 583 P.2d at 154-55.

process violation against the state.[4] Contrary to that prognostication, in the more than three decades since *Ducharme* was decided, no decision of this Court has even suggested that political subdivisions had acquired due-process rights that might be asserted against its own State. Instead, this Court has strengthened its deference to state sovereign authority. *See, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).

Moreover, even while striking down the conclusive presumption statute, *Ducharme* suggested that the State could accomplish its objective, without offending constitutional principles, by imposing a straightforward obligation on political subdivisions to pay benefits to the same firefighters and police officers without calling it "workers compensation." *See Gregory* , 501 U.S. 452 at 322. The Connecticut legislature then took up the court's suggestion and enacted Conn. Gen. Stat. § 7-433c, obligating political subdivisions to provide special compensation in the manner of workers compensation benefits without calling it that to firefighters and police officers who suffer heart disease after meeting certain eligibility requirements. This statute was subsequently upheld against constitutional attack in *Grover v. Town of Manchester*, 357 A.2d 922, *appeal dismissed*, 423 U.S. 805 (1975).

Ducharme, thus, must be regarded as a confused decision and imperfect conflict, permitting a state to accomplish directly – by direct requirement of compensation – what it did not permit to occur through indirection, application of a conclusive presumption to the

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[4] The Connecticut Supreme Court found the due process violation under both the state and federal constitutions without engaging in any analysis that would suggest that the decision was based on adequate and independent grounds.

existing workers compensation system. The result is the same and constitutes little more than a distinction without a difference. Just as the "controlling influence of the Constitution may not be destroyed by doing indirectly that which it prohibits from being done directly," *Pullman Co. v. State of Kansas ex rel. Coleman*, 216 U.S. 56, 70 (1910), the Connecticut court's attempt to draw a distinction between the invalidated indirect attempt to help police and firefighters in favor of its endorsed direct attempt renders its precedential value a nullity and deprives Petitioner of its asserted conflict.

PACT urges upon this Court Connecticut's schizophrenic approach. It states that if "Nevada has an interest in making an outright gift or special benefit to police officers and firemen, it must do so *outside* the Nevada Industrial Insurance Act and Nevada Occupational Disease Act." Pet. at 10 (emphasis added). Yet no principle of constitutional law requires a sovereign state to eschew use of those two state statutes as a vehicle for this end in favor of another. In fact, how a State chooses to govern itself is largely outside the cognizance of federal instruction. *See, e.g., New York v. United States*, 505 U.S. 144, 162 (1992) (holding that "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). *See also Sweazey v. New Hampshire*, 354 U.S. 234, 256 (1957) ("It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the forty-eight states.") (Frankfurter, J., concurring).

Any conflict between Connecticut's *Ducharme* decision and that of the Nevada Supreme Court in the instant case turns on form rather than substance and cannot be regarded as certworthy. Moreover, more recent state supreme court decisions conclude that there is no

constitutional flaw. In addition to the Nevada decision below, the California Supreme Court upheld its similar conclusive presumption in *City and County of San Francisco, supra.*[5] In 1959, California amended its relevant statute to provide that a five-year or greater police force veteran's heart disease is occupationally related, and the presumption is not subject to rebuttal on the basis of evidence of a preexisting condition.[6] *Id.*, 583 P.2d at 153. In response to an identical constitutional challenge, the California Supreme Court found *Usery, supra*, "directly on point and clearly demonstrates the lack of merit in the city's due-process contention." *City and County of San Francisco,* 583 P.2d at 160. In *Usery,* this Court upheld a irrebuttable presumption in the Black Lung Act, 30 U.S.C. § 921 (c)(1), (2), that the death of a miner, who had worked in coal mines for 10 years and who died of respiratory disease, arose out of and in the course of employment.

II. NO FEDERAL ISSUE REQUIRING THIS COURT'S ATTENTION IS PRESENTED

PACT further asserts that the importance of the question presented can be gleaned from a newspaper

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[5] Other types of irrebuttable presumptions have also been upheld, such as conclusive presumptions of dependency. *See Flint River Mills v. Henry,* 236 S.E.2d 583 (Ga. 1977) (stepchildren); *McDonald v. Chrysler Corp.,* 242 N.W.2d 810 (Mich. 1976) (spouse, if living with worker); *Fidelity & Cas. Co. of N.Y. v. Masters,* 335 So.2d 722 (La. Ct. App. 2d Cir. 1976), *writ denied,* 338 So.2d 297 (La. 1976).

[6] Petitioner cites *Ducharme* for the mistaken proposition that no other state had adopted a conclusive presumption on the heart disease question as it affected police or firefighters. Pet. at 5. In so opining, the Connecticut court missed the 1959 California law.

article and recent actuarial studies alleging that the cost of compliance with the challenged statute and several others covering lung and hepatitis injuries on the job would amount to $2.8 billion over the next three decades for Nevada political subdivisions. Pet. at 4, 13. PACT concedes that this information was not part of the record during the administrative hearing and was submitted for the first time below in a petition for en banc consideration before the Nevada Supreme Court. *Id.* Nevada Rule of Appellate Procedure 40A(c) prohibits parties from raising issues in such a petition for the first time. While the assertions should receive no credit at all because it was not properly presented for consideration nor actually considered below, the potential costs in-state is properly a matter for state legislative consideration and does not transform this intramural dispute into one of sufficient national importance to draw this Court's attention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ROBERT S. PECK*
CENTER FOR CONSTITUTIONAL LITIGATION, P.C.
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 944-2874

Barbara Gruenewald
ANDERSON & GRUENEWALD
439 Marsh Avenue
Reno, Nevada 89509
(775) 322-3366

**Counsel of Record*